Supreme Court, U. S.
FILED
JUL 8 1980
MICHAEL RODAK, JR., CLERK

NO. 79-1935

IN THE

Supreme Court of the United States

SOUTHERN PACIFIC TRANSPORTATION COMPANY,
Petitioner

versus

PATRICIA ANN PHELPS BAILEY; CONNIE MAXINE ALLEN; JOY LYNN PHELPS; KIMBERLEY LEA TOURTELOTTE; ROBERT DERON PHELPS, a Minor; RONALD DEWAYNE PHELPS, a Minor; and ALICE ROWENA WATSON,
Respondents

MEMORANDUM OPPOSING CERTIORARI

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Respondents Respectfully Represent To The Court As Follows:

Petitioners contend that writ should be granted in this case because the District Court and the Court of Appeals rendered a decision in conflict with Texas state statutory and judicial law. Contrary to Petitioner's contention, this case does not merit granting the writ because a review of the Texas appellate decisions and the Fifth Circuit's decisions regarding Article 4675a, Texas Revised Civil

Statutes Annotated, Volume 13A, Page 297 (West Supp. 1980) demonstrate that the holding of the Court of Appeals in this case is not at variance with the Texas statutory and judicial authority.

By affirming the District Court's instruction regarding remarriage evidence, the Court of Appeals followed a prior decision of its own, *Conway v. Chemical Layman Tank Lines, Inc.*, 525 F.2d 927 (Panel), 540 F.2d 837 (5th Cir. 1976) (Panel rehearing), and a Texas Court of Civil Appeals decision, *Richardson v. Holmes*, 525 S.W.2d 293 (Tex. Civ. App.—Beaumont, 1975, writ ref'd, n.r.e.). Moreover, the holding of the Court of Appeals is not at variance with the Texas Supreme Court's ruling on Article 4675a, *Exxon Corporation v. Brecheen*, 526 S.W.2d 519 (Tex. 1975), since its ruling merely held that Article 4675a foreclosed the State intermediate appellate court's power to review the effect of the jury's evaluation of remarriage evidence. In fact, the Court of Appeals decision in this case directly follows the only high court consideration of the effect of remarriage evidence since it is keeping with the Court's ruling on the writ of error that was sought from the opinion in *Richardson* (supra).

This Court rarely intervenes on issues of State law to overrule a lower Federal Court interpretation or application of the local law in which it is skilled and with which it is confronted on a regular basis. This principle has most recently and clearly been demonstrated through the Court's New Rules which became effective June 30, 1980. *Boskey and Gressman*, "The Supreme Court's New Rules of the Eighties" 100 S.Ct. No. 16 at pgs. 25-27, yellow pages of advanced paperback edition (June 15,

1980). Old Rule 19 regarding considerations governing review on certiorari listed as one of the reasons moving in the direction of a grant of certiorari the situation where a Federal Court of Appeals "has decided an important state or territorial question in a way in conflict with applicable state or territorial law". This item of consideration was not included in New Rule 17 which now sets forth considerations governing review on certiorari. *Id.* pg. 43. Its deletion clearly exemplifies the Court's hesitance, in dealing with issues of state law, to disturb the decisions by a Federal Court skilled in the law of the particular state unless the Federal Court's holding is clearly wrong or unreasonable. *See also, Propper v. Clark,* 337 U.S. 472, 486-487, 69 S.Ct. 1333, 1341-1342, 93 L.Ed. 1480 (1949); *United States v. Durham Lumber Company,* 363 U.S. 522, 80 S.Ct. 1282, 4 L.Ed.2d 1371 (1960).

The conclusion in this case has been achieved by federal judges who deal regularly with questions of Texas state law. Their ruling is correct. It is not at variance with Texas statutory and judicial authority. Even if Texas statutory and judicial authority leaves some question as to the true effect that Article 4675a should have on juries' considerations of remarriage evidence, the Court of Appeals' conclusion is not unreasonable or clearly wrong. See *Bishop v. Wood,* 426 U.S. 341, 345-348, 96 S.Ct. 2074, 2077-2079, 48 L.Ed. 684 (1976); *Butner v. The United States,* 99 S.Ct. 914, 919 (1979); *MacGregor v. State Mut. Life Assur. Company,* 315 U.S. 280, 281, 62 S.Ct. 607, 86 L.Ed. 846 (1942); and *Huddleston v. Dwyer,* 322 U.S. 232, 237, 64 S.Ct. 1015, 1018, 88 L.Ed. 1246 (1944).

Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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KENNETH L. PARKER
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for Respondents

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing instrument were duly served in the number and the manner prescribed by the rules of this Court upon all other counsel of record this the _____ day of July, 1980.

KENNETH L. PARKER